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FISCAL IMPACT REPORT

SPONSOR HJC DATE TYPED 3/11/05 HB 246 & 734/HJCS

SHORT TITLE Remedies for Identity Theft Victims SB _____

ANALYST Ford

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
			\$1,250.0- \$2,000.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB 260, SB 646

SOURCES OF INFORMATION

LFC Files

SUMMARY

Synopsis of Bill

The House Judiciary Committee substitute for House Bills 246 & 734 increases the crime of identity theft from a misdemeanor to a fourth degree felony, establishes the time limit for prosecution of identity theft, expands the definition of identity theft, provides a method for expunging court records of false information, requires the attorney general (AGO) to issue a new form of identification, known as identity theft passports, to victims, requires the AGO to maintain a database of reported identity theft victims, and requires consumer reporting agencies to block inaccurate information on consumer reports.

Significant Issues

► Penalties and Prosecution

The bill changes identity theft from a misdemeanor to a fourth degree felony. The bill establishes a time limit for prosecution of 5 years from the time the crime was discovered. This is consistent with the general statute of limitations for a fourth degree felony except that the time limit begins when the crime was discovered, not when it was committed.

By starting the statute of limitations at the time the crime was discovered instead of committed,

the bill recognizes that victims often do not discover that their identities have been stolen until well after the initial fraudulent act has been committed.

Changing the crime to a fourth degree felony allows district attorneys to subpoena witnesses from out of state, which may aid in prosecution.

► **Definition of Identity Theft**

The bill expands the definition of identity theft to include using a person's identifying information with the intent to sell or distribute the information to another for an illegal purpose.

The bill also extends the definition to include using personal identifying information of another person, or of a false or fictitious person, to avoid summons, arrest, or prosecution or to impede a criminal investigation.

The bill expands the definition of "personal identifying information" to recognize changes in technology and business practices and adds a definition of "biometric data."

► **Expungement from Police and Court Records**

The bill establishes a process by which an identity theft victim whose identity was used by someone who was charged or arrested under his/her name can petition the court for a determination of factual innocence. If the court finds by clear and convincing evidence that the person did not commit the offense with which the person's identity has been associated, the court shall issue an order certifying the person's factual innocence. The court shall then order that person's name to be removed from the records. The court shall order expungement of the arrest. The bill also provides a process for vacating the determination of factual innocence.

► **Written Police Reports**

The bill requires a law enforcement officer who interviews a victim of identity theft to make a written report on forms provided by the AGO and to file the police report with the AGO.

► **Identity Theft Passport and Database**

The bill requires the AGO, in cooperation with the department of public safety and the motor vehicle division (MVD) of the taxation and revenue department, to issue an identity theft passport to persons who claim to be a victim of identity theft and provide the following specific information:

- Certified copy of a court order determining factual innocence
- A driver's license or other government-issued identification or record and
- Other information as required by the attorney general

The passport shall contain a picture of the person and shall be accepted as evidence of identity by law enforcement and others who may challenge the person's identity.

The bill allows the AGO and MVD to enter into a memorandum of understanding for the development and issuance of the passport and requires MVD to make a note in the person's driver record when an identity theft passport has been issued.

The passport would be available only to those victims whose identities have been used by someone who has been arrested or charged with a crime. This is a relatively small percentage of identity theft victims. According to the federal trade commission (FTC), only 4.6% of New Mexico's 1,317 identity theft cases in 2003 involved the illegal/criminal use of the victim's identity.

There may be concerns about the security of the identity theft passport and the considerable damage that could be done by someone if a passport is stolen or forged, particularly since law enforcement is required to accept it as evidence of identity.

The bill requires the AGO to maintain a database of identity theft victims who have reported to a law enforcement agency or have been issued an identity theft passport. Access to the database will be limited to criminal justice agencies or to the person who has been the victim of identity theft.

The measure also requires the AGO to develop information on identity theft, distribute it to law enforcement and make it available to the public. This should be relatively easy to do since the AGO already has information posted on its website which could be supplemented by readily available information provided by numerous consumer groups.

► Credit Reports

The measure requires a consumer reporting agency, within 30 days of receipt of a police report from an identity theft victim, to block any information the victim alleges appears on his report as a result of the identity theft. The bill establishes provisions for the consumer reporting agency to decline or rescind the block.

These provisions appear to duplicate federal law which prescribes the requirements of consumer reporting agencies to block fraudulent information. However, federal law requires the consumer reporting agencies to block the information within 4 business days of the receipt of the information. (See "Other Substantive Issues" below.)

FISCAL IMPLICATIONS

The bill will result in significant costs to the general fund resulting from increased workload to the courts, NMCD, AGO and MVD.

Significant costs will be incurred by the AGO, which will be charged with establishing the identity theft passport system and database. AGO suggests that it would incur startup costs to develop the database, as well as yearly costs to maintain the program. AGO analyzes that these costs will, among others, include staff of 1 general administrative staff, 1 data entry/data base maintenance staff, 1 attorney, 2 investigators, and 2 advocates. Combined with the costs of supplies, hardware, travel, training, equipment and other basic needs, these costs are estimated by the AGO to be \$1 million to start up and \$750 thousand annually thereafter.

The expansion of the definition of identity theft and the provision allowing for a determination of factual innocence will result in an increased number of judicial proceedings. However, according to the FTC, only 4.6% of New Mexico's 1,317 identity theft cases in 2003 involved the illegal/criminal use of the victim's identity. Thus, the number of individuals seeking to clear their criminal records is likely to be low.

Increasing identity theft from a misdemeanor to a fourth degree felony may result in an increase in costs to the NMCD. According to the Federal Trade Commission, there were 1,317 victims of identity theft in New Mexico in 2003. According to the Identity Theft Resource Center, the arrest rate for identity theft is under 5%. As an example, if even 2.5% of roughly 1,300 cases resulted in an arrest and 4th degree felony conviction, the NMCD could see an increased population of 32 individuals, generally serving 18-month sentences. Based on NMCD per-inmate cost estimates, this could result in increased costs of approximately \$990 thousand to \$1.26 million. This does not take into consideration any probation and parole costs. However, it is difficult to predict what the actual arrest and conviction rate would be.

Law enforcement may incur minor cost increases to make their police reports on the prescribed forms and to file those forms with the AGO. MVD will incur minor costs to update driver records.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Senate Bill 260 makes the crime of identity theft a fourth degree felony. Senate Bill 646 codifies the process to expunge a criminal record for, among others, victims of identity theft.

OTHER SUBSTANTIVE ISSUES

Section 5, relating to credit reports duplicates provisions of federal law regarding the blocking of inaccurate information. The Fair and Accurate Credit Transactions (FACT) Act provides:

15 USCS § 1681c-2 (2005) Block of information resulting from identity theft

(a) Block. Except as otherwise provided in this section, a consumer reporting agency shall block the reporting of any information in the file of a consumer that the consumer identifies as information that resulted from an alleged identity theft, not later than 4 business days after the date of receipt by such agency of--

- (1) appropriate proof of the identity of the consumer;
- (2) a copy of an identity theft report;
- (3) the identification of such information by the consumer; and
- (4) a statement by the consumer that the information is not information relating to any transaction by the consumer.

This provision went into effect on December 1, 2004. The law also provides authority to the consumer reporting agency to decline or rescind a block.

With certain limitations, the states are allowed to enact laws that go beyond the provisions of the FACT Act. However, the provisions in this bill do not go beyond federal law and thus, would be pre-empted by federal law.

The crime of identity theft remains prevalent and costly. According to the 2005 Identity Fraud Survey Report co-released by Javelin Strategy & Research and the Better Business Bureau, 9.3 million American adults were victims of identity fraud in 2004 for a total cost of \$52.6 billion. Most thieves obtain personal information through traditional channels, such as through a lost or stolen wallet or theft of mail, rather than through electronic means

POSSIBLE QUESTIONS

Are the bill's provisions requiring the blocking of consumer data given pre-empted by federal law?

Given the presumption created in the bill that the identity theft passport is accurate, does the bill create a new avenue for identity theft and/or fraud?

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